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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-296

D. C. WILLIAMS,

Petitioner,

v.

MATTHEWS COMPANY, et al.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner, D. C. Williams, files this supplemental brief pursuant to Rule 24(5) calling attention to the recent decision of the Sixth Circuit in *Weathers* v. *Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974). The reported opinion was not available at the time the Petition For A Writ Of Certiorari was filed. Petitioner submits that this decision adds another special and important reason to grant review on certiorari.

The Eighth Circuit Has Rendered a Decision in Conflict with the Decision of the Sixth Circuit That a Black Class Representative Need Not Demonstrate That Other Persons Have Been Subjected to Racial Discrimination in Order to Maintain a Class Action in a Fair Housing Suit.

After finding that the Matthews Company, *et al.* had engaged in racial discrimination in their real estate operations, the Eighth Circuit ruled that the class action pursuant to Rule 23(b)(2), Fed. R. Civ. P., could not be maintained because Mr. Williams had failed to show that other

black persons had attempted and been denied the right to purchase property from the Matthews Company.[1] This decision is squarely in conflict with the Sixth Circuit decision in *Weathers* v. *Peter Realty Corp., supra,* 499 F.2d at 1199-1201, that a class action could not be dismissed merely because the one black class representative had not shown that other black persons had attempted and been denied the right to rent an apartment by the defendant realty company. The Sixth Circuit found it sufficient to survive dismissal that:

> The plaintiff made allegations that she was discriminated against because of her race. She also alleged that there are others of her race 'who are, have been or will be seeking housing,' at the defendant's property. 499 F.2d at 1200.

Mr. Williams alleged no less.[2]

The Eighth Circuit rested its restrictive decision on the rule that "a single black family is not a class." Petition at A-15. On the other hand, the Sixth Circuit reasoned that:

> In civil rights cases of the nature of the present case, the numerosity requirement is usually satisfied by the showing of a colorable claim by the named plaintiff who is a member of a larger class having potentially similar claims. *See* Wright and Miller, 7 Federal Practice and Procedure Sec. 1762 (1972). Although the district court

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[1] The Matthews Company, *et al.*, did not affirmatively assert below that no black person had attempted or been denied the right to purchase. Indeed, the Company specifically admitted that, "During the past five years, several black citizens have made inquiry about purchasing real property within the Lakewood subdivision but that, thus far, none have purchased real property therein." Appendix on Appeal at 11.

[2] In fact, Mr. Williams did more than make allegations below, see Petition For A Writ Of Certiorari at 14-15.

> has broad discretion in determining whether a particular action complies with Rule 23(a), by meeting all four requirements, the application of these requirements should not be so strictly applied that the policies underlying class actions would be undermined. 499 F.2d at 1200.

See, Wright & Miller, 7 Fed. Pract. and Proc. § 1771(1972). The policy inherent in Rule 23(b)(2) class actions is that the class should be defined broadly. *Id.* The Sixth Circuit also reasoned, on a related issue, that:

> The district court's conclusion that the plaintiff's motion for injunctive relief was mooted by the defendant's offer to rent the suite to her is predicated on the assumed absence of a party to the action who would benefit from such relief. The district court apparently reasoned that the plaintiff is entitled to pray for relief for herself, but not for others who it assumed were not properly before it. But mooting the named plaintiff's personal claim for injunctive relief, does not preclude this form of relief if, as we have decided, the issue of the maintainability of a class action is still open. To allow a defendant to moot a "fair housing" class action by making concessions to the named plaintiffs would thwart the purposes of this important type of litigation. 499 F.2d at 1201.

In short, the Sixth Circuit was of the opinion that racial discrimination is necessarily class discrimination.

The basis of the Sixth Circuit's decision in *Weathers* is the rule governing whether a class action is justified when injunctive relief is sought against a practice of discrimination stated by Judge Gray in *Hall* v. *Werthan Bag Corp.*, 251 F.2d Supp. 184, 186 (M.D. Tenn. 1966):

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class.

This often-cited rule has been cited in employment discrimination cases by the Sixth Circuit, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355 (6th Cir. 1969); the Fifth Circuit, *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 35 (5th Cir. 1968); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969); the Fourth Circuit, *Graniteville Co. (Sibley Div.)* v. *EEOC*, 438 F.2d 32, 37 (4th Cir. 1971) and numerous district courts. The decision of the Eighth Circuit in *Williams* v. *Matthews Co.* is thus in conflict with substantial authority.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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